IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO.1005 OF 2000

Elizabeth Nagendra Addakallu ...Petitioner
vs.
Nagendra Sheshayya Addakallu & Ors. ...Respondents

Mr.P.R.Arjunwadkar for the Petitioner
Mr.Mule i/b Mr.G.S.Godbole for Respondent No.2
Mr.K.V.Saste,A.P.P. for State

CORAM: A.S.OKA,J.
DATE ON WHICH THE JUDGMENT IS RESERVED: AUGUST 5,2005
DATE OF PRONOUNCEMENT OF THE JUDGMENT : AUGUST 12,2005

JUDGMENT:

1. This Petition under Article 226 and 227 of Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code of 1973) arises out of the Application under Section 125 of the said Code of 1973.

2. The Petitioner along with her daughter and two sons applied under Section 125 of the said Code of 1973 against the Respondent-husband for grant of monthly allowance. The case of the Petitioner is that during the period in which she was staying with the Respondent No.1, he used to suspect her character and used to abuse and beat her. On 18th February 1992, the Respondent No.1 left the matrimonial home and thereafter contracted a second marriage. Since that date the Respondent No.1 stopped providing anything for the maintenance of the Petitioner and her children. The case of the Petitioner in the Application was that she had no source of

income and she was not in a position to maintain her children. Her further case was that the Respondent No.1 is serving with the Maharashtra State Electricity Board and is getting monthly salary of Rs.5000/- per month. It is the case of the Petitioner that the Respondent No.1 is doing work as private electrician and is earning Rs.2000/- per month.

3. The Respondent No.1 denied all the allegations made against him and submitted that on 13th February 1992, by a deed of divorce the marriage between the Petitioner and the Respondent No.1 has been dissolved. His contention is that by the deed of divorce the Petitioner gave up her right to claim the maintenance.

4. The learned Magistrate held that the statutory right of the Petitioner and her children to receive the maintenance amount from the Respondent No.1 cannot be done away with or negatived by the Respondent No.1 by setting up the agreement to the contrary. The learned Magistrate, however, held that the Petitioner is serving on temporary basis as maid servant in a maternity home and income which she was getting was sufficient to maintain her. Therefore, the learned Magistrate held that the Petitioner was not entitled to maintenance. The learned Magistrate held that the original Applicant No.2 i.e. the daughter of the Petitioner had attained majority and therefore, she was not entitled to claim any monthly allowance. The learned Judge, however, partly allowed the

application and directed the Respondent No.1 to pay a sum of Rs.400/- per month each to the original Applicant Nos.3 and 4 who are the sons of the Petitioner and the Respondent No.1.

5. A Revision Application was preferred by the Petitioner for challenging the Judgment and Order passed by the learned Magistrate in so far as it relates to denial of maintenance to the Petitioner. The said Revision Application was rejected by the learned Additions Sessions Judge. The learned Additional Sessions Judge relied upon the deed of divorce and held that the Petitioner has surrendered her right to receive maintenance. He held that there was a divorce between the spouses.

6. The learned Counsel for the Petitioner submitted that there was nothing placed on record by the Respondent No.1 to show that there was a custom in the community of the Petitioner and the Respondent No.1 by which the marriage can be dissolved by executing a deed of divorce. He submitted that the statutory right of the Petitioner cannot be defeated by a clause incorporated in the alleged divorce deed regarding surrender of right to maintenance. He placed reliance on the decision of the Division Bench of this Court reported in A.I.R. 2004 Bombay page No.345 (Geeta Satish Gokarna Vs.Satish Shankarrao Gokarna). He submitted that the Revisional Court has recorded a finding that for a period of 15 months the Petitioner was working in a hospital where she

was provided work for about 10 days in a month. The learned Additional Sessions Judge held that the learned Magistrate committed an error by holding that the Applicant was in a position to maintain herself. He, therefore, submitted that the Petitioner is entitled to maintenance.

7. The learned Counsel for the Respondent No.1 submitted that there is evidence on record to show that the Petitioner was employed in a nursing home and therefore it was for the Petitioner to disclose in her application and evidence that she was employed and that she was getting a particular amount by way of income. He submitted that as the Petitioner has not disclosed her income, she is not entitled to claim maintenance. He submitted that by the deed of divorce, the Petitioner has given up her right to maintenance. He pointed out that both the sons of the Petitioner have attained majority and therefore now the liability of the Respondent No.1 to pay maintenance to the sons on the basis of order passed by the learned Magistrate has come to an end.

8. I have considered the rival submissions. Perusal of the alleged deed of divorce dated 13th February 1992 shows that the Petitioner and the Respondent No.1 purported to take customary divorce. There is nothing on record produced by the Respondent no.1 to show the existence of the customs in the community to which the Petitioner and the Respondent No.1 belong. Thus, the Respondent No.1 cannot claim that the

marriage between the Petitioner and the Respondent No.1 stands dissolved by a customary divorce.

9. Clause 4 of the alleged deed of divorce records that the Petitioner has no right to claim maintenance as the wife of the Respondent No.1. The learned Additional Sessions Judge has held that as the Petitioner has surrendered her right to claim the maintenance, she cannot maintain an application under Section 125 of the said Code of 1973. In this behalf, a reference will have to be made to the decision of the Division Bench in the case of Geeta Satish (supra). In the case before the Division Bench, the marriage between the Appellant and the Respondent was dissolved by a decree of divorce passed by mutual consent. The decree of divorce was passed by mutual consent on the basis of the consent terms signed by the parties. In the consent terms, one of the clause was to the effect that the wife will not claim any maintenance or alimony in future from the husband. The question before the Division Bench was whether in a case where consent terms were filed which provided that the wife would not claim maintenance or alimony in future, it is still open to the wife to claim maintenance. Relying upon the earlier decision of this Court reported in A.I.R. 1945 Bombay page 537 in case of Hirabai Bharucha Vs.Pirojshah Bharucha Division Bench held thus :

> "8. Having considered the judgment in the case of Hirabai Bharucha (AIR 1945 Bom 537) (supra) the question really would be whether under Section 25(1) a party who has been divorced is entitled to

> maintenance even if in the consent terms had agreed not to claim alimony/maintenance. the language of Section 25 shows that it is a power conferred on the Court at the time of passing of the decree or at any time subsequent thereto on an application made to aware alimony or maintenance. This is a jurisdiction to be exercised by the Court. The parties, therefore, cannot by an agreement between themselves, agree to oust the jurisdiction of the Court which otherwise Parliament has conferred. The second aspect of the matter is that permanent alimony and maintenance are a larger part of the right to life. These provisions have been included to enable a person unable to maintain herself to be protected. The learned single Judge of this court in Hirabai Bharucha interpreting Section 40 of the Parsi Marriage Act has taken a view following similar views taken by English Courts that such a Section is based on public policy. that public policy is now reflected in our Constitutional philosophy. The power as conferred on the Court with the object of helping the weak. Therefore, any clause in a contract or consent terms providing to the contrary would be against public policy. (see Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress, AIR 1991 SC 101). Clause 5 of the consent terms is clearly several from the other terms of the consent terms. Clause 5 would be contrary to public policy and consequently that clause will have to be treated as non est. The only question is whether Clause (4) would bar the appellant herein from so applying. The very fact that Clause (5) was placed differently from Clause (4) will indicate that it ought to cover situations other than those covered by Clause (5). Even otherwise Clause (4) to the extent that prohibits a party from claiming maintenance would also suffer similar consequences as Clause (5) of being against public policy. Considering the above discussion the appellant was not barred from applying under Section 25(1). The application, therefore, by the appellant was clearly maintainable..."

10. Thus the Division Bench held that permanent alimony and maintenance are larger part of the right to life. The Division Bench held that there is a power vesting in the court under Section 25 of the Hindu Marriage Act, 1955 to award maintenance or alimony and the parties by an agreement cannot

agree to oust the jurisdiction of the court which is otherwise as conferred on the court. There is no reason why the law laid down by the Division Bench should not be applied to the present case. A statutory right is conferred on a wife by Section 125 of the said Code to apply for monthly allowance for maintenance against her husband. The court of Judicial Magistrate First Class is empowered to exercise power under Section 125 of the said Code of 1973. The Jurisdiction of the court to award maintenance cannot be taken away by such agreement between the parties. In a given case, where under such agreement if it is established that the wife has received some amount, at highest, it can be said that the said amount will have to be considered while fixing the quantum of monthly allowance payable by the husband.

11. In the present case the alleged deed of divorce does not record that any amount was paid to the Petitioner by the Respondent No.1 by way of maintenance. Moreover, Clause 4 of the alleged deed of divorce indicates that the Petitioner-wife is not entitled to maintenance as she is no longer the wife of the Respondent No.1. As pointed out earlier, the said deed of divorce does have effect of dissolving the marriage between the Petitioner and the Respondent No.1. Therefore, Clause incorporated in the alleged deed of divorce does not take away the power of the Court to grant monthly allowance by exercising the jurisdiction under section 125 of the said Code of 1973.

12. In the year 1996, when the application for maintenance was filed by the Petitioner, the respective ages of the sons of the Petitioner (original Applicant Nos.3 and 4) were 14 and 11 years respectively. Thus, it is obvious that both of them have attained majority and therefore under Section 125 of the said Code of 1973, they are no longer entitled to claim the maintenance. The question which remains to be answered is whether the Petitioner is entitled to any monthly allowance for maintenance. The learned Additional Sessions Judge while rejecting the Revision Application filed by the Petitioner held that from the record which is placed before the Court, the Petitioner worked for a period of 15 months in a hospital and she was provided work by the hospital for about 10 days in every month. The learned Additional Sessions Judge found that the Petitioner was given work by the hospital only when it was available and that also as a maid servant. The learned Additional Sessions Judge observed that the Petitioner appears to have been given work by the hospital authorities whenever regular maid servant was on leave. The learned Additional Sessions Judge, therefore, held that as there was no certainty of the Petitioner getting work everyday, it cannot be held that the Petitioner was able to maintain herself. He further observed that that the Trial Court should have taken into account the earning of the Petitioner while fixing the quantum of the maintenance amount. The learned Additional Sessions Judge has set aside the findings of the Trial Court that the

Petitioner was able to maintain herself.

13. No submissions are made before me that the aforesaid findings of the learned Additional Sessions Judge are incorrect or erroneous. It is thus obvious that as per the position obtaining on the date on which the maintenance application was filed, the Petitioner was entitled to receive monthly allowance from the Respondent No.1. There is no material on record to indicate as to what was the income received by the Petitioner from the Hospital Authorities. Quantum of monthly allowance cannot be fixed unless necessary material showing income of the Petitioner is brought on record. At this stage, the learned Counsel for the Respondent No.1 submitted that now the Petitioner is regularly employed by the hospital. He pointed out that the Respondent No.1 is unable to produce any material showing that the Petitioner is permanently employed as the application made by the Petitioner seeking information as regards employment of the Petitioner is kept pending by the Hospital Authorities. The question before me is whether the Petitioner was entitled to maintenance as on the date on which her application was filed. As material regarding income earned by the Petitioner from the Hospital Authorities is not on record, the case will have to be remanded to the Trial Court for a limited purpose. The learned Magistrate will allow the parties to lead evidence only on this aspect. It will be open for the Respondent No.1 to show that from a particular date, the Petitioner has

secured permanent employment and income received by the Petitioner is sufficient to maintain herself. It is however, made clear that the Petitioner is entitled to monthly allowance from the date of filing application. If the learned Magistrate finds that from a particular date the Petitioner is gainfully employed and is earning sufficient income to maintain herself, it is obvious that the learned Magistrate will award maintenance only up to that date.

14. Monthly income of the Respondent No.1 is appears to be more than Rs.2000/- per month. It is brought on record that he is an employee of the Maharashtra State Electricity Board. As of today there is nothing on record to show that the Applicant has secured permanent employment which is fetching her sufficient income. Therefore, till the application is decided afresh by the learned Magistrate, the Petitioner is entitled to interim allowance. Considering the status of the Respondent No.1, the interim allowance will have to be fixed. As there is a finding that the Petitioner is getting work for only on ten days every month, the amount of monthly allowance is fixed at Rs.350/- per month.

15. Hence, I pass the following order :

i) The impugned Judgments and Orders are quashed and set aside. The Petitioner is entitled to receive monthly allowance under section 125 of Code of Criminal Procedure,

1973 as observed in this Judgment.

ii) Misc.Application No.251 of 1996 is remanded to the Judicial Magistrate First Class at Solapur for deciding the quantum of monthly allowance in the light of the observations made in this Judgment.

iii) The learned Judicial Magistrate (F.C.), Solapur will permit the parties to lead evidence on a limited aspect indicated in this Judgment. It is made clear that issue regarding entitlement of the Petitioner to receive monthly allowance from the Respondent No.1 is concluded and what is left to be decided is the quantum of monthly allowance and the period for which the Petitioner is entitled to receive the monthly allowance.

iv) The learned Magistrate after giving opportunity to the parties to lead evidence as aforesaid will pass a reasoned order as expeditiously as possible and preferably on before expiry of period of six months from the date of receipt of the writ of this order.

v) Till the disposal of the case by the Trial Court the Respondent No.1 will pay interim maintenance of Rs.350/- to the Petitioner from 1st July 2005 onwards.

vi) Office is directed to send writ of this order

expeditiously.

vii) Rule is made partly absolute in above terms.

JUDGE